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IN THE CORPORATION COURT OF DANVILLE.

COMMONWEALTH *v.* JOHN COBBS.

1. The states have full power to prohibit or restrict the manufacture of and traffic in ardent spirits within their borders. They also have power to prohibit or restrict personal possession of ardent spirits within their borders.

2. The constitution of the United States gives to Congress authority to regulate commerce among the states. This power is exclusive, and the states have no right to interfere unless authorized by Congress to do so.

3. The Wilson Act of 1890, gave to the states the right, in the exercise of their police powers, to control the use of ardent spirits transported in interstate commerce, after delivery in the state; but that Act does not prohibit the transportation of ardent spirits in interstate commerce.

4. The Webb-Kenyon Act of March 1, 1913, divests traffic in ardent spirits in interstate commerce of its interstate character in certain cases. But it is only when ardent spirits are carried into a state to be received, possessed or sold, or in some manner used in violation of the laws of the state that the traffic becomes divested of its interstate character. The Webb-Kenyon Act does not prohibit the transportation of ardent spirits through a state, and the states are without authority to make such transportation unlawful.

5. By the Reed "Bone Dry" Amendment of March 3, 1917, Congress undertook to aid the states in the enforcement of their prohibitory statutes by making certain interstate traffic in ardent spirits an offense against the laws of the United States; but it does not enlarge the powers of the states in the exercise of control over such traffic.

John W. Carter, of Danville, Va., for the Commonwealth.

Harris & Harvey, of Danville, Va., for the defendant.

E. WALTON BROWN, Judge.

The accused, John Cobbs, is under indictment for a violation of the prohibition law of Virginia. Acts 1918, Ch. 388, p. 578.

One count, based on Sec. 17 of the Act, charges that the accused did unlawfully have in his possession ardent spirits at a certain place, to wit, in an automobile on the streets of Danville.

The other four counts, based on Sec. 39 of the Act, charge, in varying phase, that the accused did unlawfully bring ardent spirits into this state, and into the city of Danville, from a point without the state; and, that he did unlawfully transport such

ardent spirits from one point within this state, to the grand jurors unknown, to another point within this state, to wit, to the city of Danville.

By agreement between the attorney for the Commonwealth and counsel for the defendant this case was submitted to the Court for decision, without the intervention of a jury, upon the following agreed statement of facts:

That on the 30th day of April, 1919, the defendant acquired possession of 150 quarts of whiskey in the city of Baltimore, Maryland; that the said whiskey was in an automobile; that the defendant immediately started from the city of Baltimore, in the state of Maryland, with the said whiskey in said automobile, for a point in the state of Georgia, and that said whiskey and car were owned by persons residing in Georgia: That in passing through the city of Danville, in the state of Virginia, with said whiskey, he was arrested by a police officer on Main Street, one of the principal streets in said city, and the car and whiskey aforesaid were taken in possession and detained by said officer. It was further agreed that at the time of his arrest, the said John Cobbs was travelling on direct route from Baltimore, Maryland, to the state of Georgia with the ardent spirits in his possession; that said whiskey was not intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise in violation of the laws of Virginia, except as an incident to its transportation through Virginia from Maryland to Georgia, and that its transportation into and through the state of Virginia was continuous and was merely an incident to the transportation of said ardent spirits from Baltimore, Maryland, through the state of Virginia, into the state of Georgia; and that the said John Cobbs was employed by the owner of said whiskey to transport it from Baltimore, Maryland, where it was procured, on said automobile by continuous journey to the owner in the state of Georgia.

It was further agreed that the prohibition law of Georgia should be considered in evidence, though counsel for the defendant reserved the right to object to its materiality. Extraneous words omitted, the Georgia Law is as follows:

"It shall be unlawful for any * * * individual to transport, ship or carry, by any means whatsoever, with or without hire, or cause the same to be done, from any point without this state to any point within this state, or from place to place within this state, whether intended for personal use or otherwise, any * * * intoxicating liquors." Further, "It shall be unlawful for any * * * person * * * to receive from any * * * person, or to have, control or possess, in this

state, any of said enumerated liquors or beverages whether intended for personal use or otherwise, save as hereinafter excepted." The exceptions are not material here.

It is urged for the commonwealth that the importation into this state of this quantity of ardent spirits, and its transportation from point to point within this state, is a violation of Section 39, of the Virginia Prohibition Law, as it is apparent the defendant was on an unlawful mission in that he intended to transport the ardent spirits into the state of Georgia in violation of the law of that state. It is also further urged that, if the defendant is not guilty of a violation of Sec. 39, he has nevertheless committed an offense under Sec. 17, by having ardent spirits in his possession in an automobile on the streets of this city.

The defendant, while admitting his unlawful intent to transport the ardent spirits into the state of Georgia contends that in bringing the whiskey into Virginia, and in transporting it from point to point within the state, he has violated no law of the state as he was engaged in a bona fide interstate transportation from Maryland to Georgia in which he is fully protected by the Federal Law. The defendant further contends that inasmuch as his possession of the whiskey in Virginia was merely incident to its transportation through the state, if, under the law, he is immune from conviction on the charge of transporting, he cannot be guilty of the offense of having the whiskey in possession. In other words, that if he had the legal right to transport the whiskey through Virginia, he cannot be convicted on the charge of having whiskey in possession as the right to transport necessarily implies the right of possession for that purpose.

[1] It has long been well settled that the states have full power to prohibit or restrict all manufacture, sale and traffic in ardent spirits within their borders. No authority is needed for this proposition.

It is now equally well settled that the states possess power to prohibit or restrict the personal possession of such spirits. *Crane v. Campbell*, 38 Sup. Ct. Rep. 98.

It was in the exercise of these broad powers that the General Assembly of Virginia, enacted the prohibition law. Section 39 of that Act makes it unlawful for any person to import ardent spirits into this state from a point without the state; or to transport the same from point to point within this state.

The question for decision in this case, however, is, whether it is unlawful to transport ardent spirits through this state when this is only incident to its transportation in interstate commerce from the state of Maryland to the State of Georgia.

It is obvious that the decision of this question will dispose of the charge of unlawfully having whiskey in possession, for it is clear that the possession in this case was only an incident to the transportation.

The transportation in this case, being interstate in character, makes necessary this primal inquiry: Does the General Assembly of Virginia possess the power to make such transportation through the state unlawful?

[2] The Constitution of the United States grants to Congress authority to regulate commerce among the states, to the exclusion of state control over the subject. This power is comprehensive, and subject to no limitations, except such as are found in the constitution itself.

[3] Before the passage of the Webb-Kenyon Act, in 1913, it was settled by the decisions of the Supreme Court of the United States, that while a state, in the exercise of its police power, might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act of 1890 to prevent shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the state.

[4] Congress dealt further with this subject in the passage of the Webb-Kenyon Act, of March 1, 1913, and extended the prohibitions against the introduction of liquors into the states by means of interstate commerce. This Act does not deal with all interstate commerce transportation of liquors into prohibitory state territory. This Act is entitled, "An act divesting intoxicating liquors of their interstate character in certain cases." Extraneous words omitted, the Webb-Kenyon Act reads:

"The shipment or transportation, in any manner or by any means whatsoever, of * * * intoxicating liquor from one state * * * into another state * * * which intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state * * * is hereby prohibited."

This statute was construed by the Supreme Court of the United States in *Adams Express Company v. Kentucky*, 238 U. S. 190, and that Court says:

"It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. Such

shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the state wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the state to be dealt with therein in violation of local law, the subject matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

The agreed facts in the John Cobbs case are, that the defendant acquired possession of the liquor in Baltimore, Maryland; that he started from Baltimore with the whiskey in an automobile for a point in Georgia; that in passing through the city of Danville with said whiskey, he was arrested by a police officer on Main Street, and that said liquor was not intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the laws of Virginia, except as an incident to its transportation through Virginia.

It therefore follows, that, inasmuch as the agreed facts show that the liquor was not to be used in violation of the laws of this state, and there had been no commingling of such liquor with the property in this state, the Webb-Kenyon law has no application and no effect to change the general rule that the state may not regulate commerce wholly interstate. The General Assembly of Virginia evidently recognized this limitation upon its power, for by the terms of the prohibition law, which is very comprehensive, and which has been several times amended, it is not expressly made unlawful to transport ardent spirits from a point without the state, through the state, to another point without the state.

The decision of the Supreme Court of Appeals of Virginia in *Lucchesi v. Commonwealth*, 122 Va. 872, decided in January 1918, confirms this conclusion. In that case Lucchesi was charged with transporting or bringing into the state intoxicating liquor in violation of the prohibition law. His defense was that he was engaged in interstate commerce and transporting the liquor from Washington, D. C., to a point in North Carolina. This was his only defense. The Court held that if this defense was sustained by proper proof the accused should not be convicted.

But it is further urged for the Commonwealth, that as the defendant admittedly intended to transport the liquor into the state of Georgia, contrary to the law of that state, he was,

throughout his journey from Maryland to Georgia, without the protection of the commerce clause of the Federal constitution.

It would undoubtedly aid the states in the enforcement of their prohibitory statutes if such a transportation was not permitted by Federal Law, but in such cases the United States Law is supreme, and unless that law prohibits the act with which the defendant is charged, or makes valid a state statute which covers the case, the defendant cannot be punished.

In the division of powers under our system of government, it is the function of the legislative department to make the laws and the function of the judicial department to enforce them. The Courts are no more responsible for what a law may contain, so long as it is a valid enactment, than is the legislature responsible for the manner in which the courts may enforce the law. The responsibilities of these departments are as separate as their functions. If the state legislature is without authority to pass laws making such traffic through the state unlawful, it is because Congress has failed, by proper legislation, to permit the state to exercise such power. For, in the matter of commerce among the states, the Federal Law is the measure by which the power of the state is tested.

So the question is, does the Webb-Kenyon Act prohibit the transportation of intoxicating liquor from one state through another state, when such liquor is intended to be transported into and used in violation of the laws of a third state? It is clear, that if the traffic had arrived in Georgia, the defendant would be guilty under the law of that state, but this prosecution is for a violation of the laws of Virginia where the defendant was apprehended.

By the express terms of the Webb-Kenyon law, intoxicating liquors become divested of their interstate character only when they are transported from one state into another state, when such liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, in violation of the law of such state; meaning, in violation of the law of the state into which such liquor is in fact transported.

In view of the plain language and intent of this law, the Court is probably not justified in seeking the intention of Congress from the legislative debates, and history of the legislation, which may in some instances be resorted to when the meaning of the law is obscure, but in view of the importance of the question, the court will advert briefly to the history of the legislation that surrounded the bill, and resulted in its enactment by Congress.

The bill as introduced was materially amended before its passage. In considering the bill, as introduced, the first thing

done was the offer and rejection of an amendment to make criminal the transportation of liquors in interstate commerce when such liquors were intended to be used contrary to the law of the destination state. See Congressional Record, Feb. 12, 1913, p. 3081.

This seems to make it clear, that it was not the intention of Congress to make it unlawful to transport liquor from one state, through another state, when the destination of the traffic was within the borders of a third state, but only to make the prohibition apply in aid of the laws of the state, to which the traffic was destined, and into which the liquor was actually transported. It therefore follows that as such a transportation through the state is not prohibited by the Webb-Kenyon Act, the state is without power to make such an act unlawful, and the defendant is not amenable to the law of Virginia merely because he intended to violate the law of Georgia. The Webb-Kenyon Act, did not provide any penalty for its violation. It merely made valid the state prohibitory laws, to the extent stated, by divesting intoxicating liquor of its interstate character in certain cases.

[5] On March 3, 1917, the Congress passed what is known as the Reed "Bone-Dry" Amendment, which reads as follows:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid."

By this amendment the Federal Government undertook to aid the states in the enforcement of their prohibitory statutes, by making certain transportation of liquor in interstate commerce an offense against the laws of the United States. There was no attempt, by this Act, to extend the control of the states over the interstate shipment and transportation of intoxicating liquors. The rights of the states in this matter remain as fixed by the Webb-Kenyon Law.

The Reed amendment was considered by the Supreme Court of the United States in the Gudger case, decided April 14th, 1919, 39 Sup. Ct. Rep. 323, the opinion of the Court being delivered by Chief Justice White. Gudger was a passenger on a railroad train from Baltimore, Md., to Asheville, N. C. While the train was temporarily stopped at the station at Lynchburg, Va., he was arrested, his baggage examined, and it was found that he had in his valise some seven or more quarts of whisky. It was his intention to remain on the train and carry the

liquor with him into the state of North Carolina. The Court in its opinion says:

"We are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any state or territory the laws of which state or territory prohibit the manufacture,' etc., includes the movement in interstate commerce through such a state to another. No elucidation of the text is needed to add cogency to this plain meaning, which would, however, be reinforced by the context if there was need to resort to it, since the context makes clear that the word 'into,' as used in the statute, refers to the state of destination, and not to the means by which that end is reached, the movement through one state is a mere incident of transportation to the state into which it is shipped."

This decision, reinforces the construction of the very similar language of the Webb-Kenyon Act.

It is true that this state of the law leaves open an avenue of evasion for bootleggers to ply their trade by automobiles under the guise of interstate traffic through the state, and however much this situation is to be deplored, this case is decided, as it must be, on its particular facts. In cases of transportation by automobile it will not be sufficient for the defendant to claim that he is going through the state, for under the law of Virginia, as announced in the Lucchesi case, when the accused, in such cases, is found in possession of more than one quart of ardent spirits, the burden is upon him to prove that he intended to make, and, at the time of his arrest, was making a continuous journey from a point without this state, through this state, to another point without this state. And, it may be added, if the evidence discloses that the liquor was intended, by any person interested therein, to be received, possessed, sold or in any manner used in violation of any provision of the prohibitory law of Virginia, such a transportation, though interstate, would not be protected.

In this case the defendant, John Cobbs, has set up a valid defense on facts admitted by the attorney for the commonwealth to be true, and he must therefore be discharged from custody, as he is not guilty of the crime charged.